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No. 81-2386

In the Supreme Court of the United States

October Term, 1981

PHILIP DEL COSTELLO,
Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT ANCHOR MOTOR FREIGHT, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the lower courts correctly apply Maryland's limitations period for the vacation of arbitration awards to the petitioner's §301 claims against a union?

2. Did the lower courts properly decline to apply the statute of limitations found at 29 U.S.C. §160(b) to an action brought pursuant to the Labor Management Relations Act, in lieu of Maryland's applicable limitations period for the vacation of arbitration awards?

3. Did the lower courts correctly allow retrospective application of *United Parcel Service, Inc. v. Mitchell* to the facts of this case?

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Respondent Anchor Motor Freight, Inc. through counsel respectfully prays that the Petition for Writ of Certiorari be denied.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland at 524 F. Supp. 721 (D. Md. 1981) is the decision from which this petition arose. This opinion substantially revised the earlier decision of the district court at 510 F. Supp. 716 (D. Md. 1981). The opinion of the Court of Appeals for the Fourth Circuit, affirming 524 F. Supp. 721 (D. Md. 1981), is unpublished but reported at 679 F.2d 879 (4th Cir. April 19, 1982).

STATUTES INVOLVED

National Labor Relations Act §10(b), 29 U.S.C. §160(b)

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules

of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Labor-Management Relations Act §301(a), 29 U.S.C. §185(a)

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Md. Cts. & Jud. Proc. Code Ann. §3-224

(a) *Petition.*—(1) Except as provided in paragraph (2), a petition to vacate the award shall be filed within 30 days after delivery of a copy of the award to the petitioner.

(2) If a petition alleges corruption, fraud, or other undue means it shall be filed within 30 days after the grounds become known or should have been known to the petitioner.

(b) *Grounds.*—The court shall vacate an award if:

(1) An award was procured by corruption, fraud, or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral, corruption in any arbitrator, or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement,

refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of §3-213, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement as described in §3-206, the issue was not adversely determined in proceedings under §3-208, and the party did not participate in the arbitration hearing without raising the objection.

(c) *When award not to be vacated.*—The court shall not vacate the award or refuse to confirm the award on the ground that a court of law or equity could not or would not grant the same relief. (Ann. Code 1957, art. 7, §12; 1973, 1st Sp. Sess., ch. 2, §1.)

Md. R. P. E2

After a final award has been made in writing in an arbitration to which the Maryland Uniform Arbitration Act is inapplicable, court proceedings may be had to confirm, vacate, modify, correct, or enter judgment on the award. In any such case, the provisions of the Maryland Uniform Arbitration Act concerning such proceedings shall be applicable.

Md. R. P. E4

The procedure for application to a court otherwise than as provided in Rule E2 of this Subtitle for any relief in connection with an arbitration to which the Maryland Uniform Arbitration Act is inapplicable, shall be as nearly as practicable the same as that provided for such an application in arbitration to which said act applies. This Rule affects only the procedure in such proceedings and does not establish a right to have any question determined by court.

COUNTERSTATEMENT OF THE CASE

The petitioner brought an action pursuant to §301 of the Labor Management Relations Act, 29 U.S.C. §185, in the United States District Court for the District of Maryland, seeking essentially the same relief that had been denied to him in a grievance arbitration proceeding. This action was filed more than seven months after the adverse arbitration award was issued, at a time when judicial determinations within Maryland and the Fourth Circuit provided no authoritative guidance on the amount of time a party could defer filing a timely action. For over a decade other federal courts in numerous jurisdictions had been applying state statutes of limitations for actions to vacate arbitration awards to cases such as the petitioner's. However, the petitioner chose to ignore Maryland's limitations period for arbitration vacation actions and delayed the commencement of litigation. On the basis of these facts, after reviewing the Supreme Court's decision in *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), the district court granted summary judgment in favor of the respondents, holding that the petitioner's action was time-barred. The lower court concluded that Maryland's statute of limitations for actions to vacate arbitration awards was applicable to §301 claims against employers and unions, in accordance with the view expressed by the majority of the justices in *Mitchell*, and that it was appropriate to apply this state limitations period to a case filed prior to Mitchell's issuance. The court of appeals summarily affirmed the decision of the lower court, based on the reasoning found in that court's opinion. The holding of the Court of Appeals for the Fourth Circuit is in harmony with those of other circuit courts, as well as the opinion of the Supreme Court in *Mitchell*. The granting of a writ of certiorari in this case will therefore

resolve no substantial conflict. Under these circumstances it is appropriate for this Court to decline to allow a writ of certiorari to be issued.

Factual Background

Respondent Anchor Motor Freight, Inc. (Anchor) is a corporation engaged in the business of transporting new automobiles throughout this country and in Canada. Petitioner Philip Del Costello was for a time employed by Anchor at its Baltimore, Maryland facility as a driver, hauling cars. Respondent Freight Drivers and Helpers, Local 557 (Local 557) is a labor organization affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. At all times relevant to this action, Del Costello was a member of Local 557, which served as his exclusive bargaining agent at Anchor.

The terms and conditions of Del Costello's employment with Anchor were detailed in the National Master Automobile Transporters Agreement and supplemental agreements (the Agreement). This document also established readily available procedures for the resolution of labor disputes.

On June 27, 1977 Del Costello was assigned to drive a tractor-trailer loaded with new cars from the Baltimore terminal to Canada. Even after some requested repairs were made and his superiors assured him that the equipment was safe, Del Costello refused to drive the rig claiming that it was still unsafe. Anchor dispatched the vehicle without further repairs to another driver who examined the equipment, found no hazards and safely made the designated trip.

Del Costello's refusal to work was construed by Anchor as a voluntary quit. When informal attempts by Local 557 to gain Del Costello's reinstatement proved fruitless, formal grievance proceedings were initiated by the union.

In mid-July, 1977, a hearing was held on Del Costello's grievance before the Eastern Joint Conference Automobile Transporters Joint Committee (Joint Committee). Article 7, Section 6 of the Agreement provides in pertinent part that "[a] decision by a majority of a Panel of any of the Committees shall be final and binding on all parties, including the employee and/or employees affected." The Joint Committee denied Del Costello's grievance and held that the plaintiff's refusal to follow his superior's instructions constituted a voluntary quit. Del Costello received a copy of the adverse award "several days" after it was rendered. *Delcostello v. International Broth. of Teamsters, etc.*, 524 F. Supp. 721, 722 (D. Md. 1981).

On or about August 19, 1977, Local 557's Business Agent sent Del Costello a copy of the minutes of his grievance. The Business Agent informed him in an accompanying letter that these minutes were to be submitted for approval at a scheduled meeting of a Joint Committee. By sending him the minutes, the Business Agent gave Del Costello an opportunity to make any corrections that he deemed necessary before the Joint Committee acted in mid-September. The process to be followed then was much the same as when a deposition is presented to the deponent for review. Del Costello, like a deponent, was to correct clerical or other similar errors in the document in order to assure its accuracy; he was not to change or add new material to his prior testimony. Nowhere in the Business Agent's letter was it stated that either Del Costello's response or the September Joint Committee meeting might

be used as a forum for the rehashing of Del Costello's grievance or for the airing of his dissatisfaction with the handling and result of his grievance. Nowhere was it suggested that the decision underlying those minutes was less than final and binding.

Del Costello did not contest either the accuracy of the minutes or the finality of the Joint Committee decision in his response. Instead, he set out the reasons for his dissatisfaction with the contractual grievance process. This was not a formal request for a rehearing of his grievance; nowhere in the letter was a rehearing requested. To the contrary, Del Costello asserted in his letter that even if the Joint Committee had heard all of the relevant evidence, it would have been incompetent to understand it.

Proceedings Below

The petitioner had knowledge of all the facts on which he was to base his lawsuit by August 20, 1977, at the latest. *Id.* at 722. Nevertheless, he waited until March 16, 1978 to file an action in the Federal District Court for Maryland, alleging that his employment had been wrongfully terminated by Anchor and that Local 557[1] had breached its duty to represent him fairly in the ensuing grievance proceedings.[2] This action, which in effect seeks to vacate the July, 1977 Joint Committee award in order to obtain the

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1. The International Brotherhood of Teamsters (International) was also named as a defendant in the petitioner's complaint. The allegations concerning the International are not material to the petition.

2. Nothing in the record below indicates that in the interim Del Costello filed a complaint of any nature with the National Labor Relations Board concerning his employer or the termination of his employment. Consequently, the petitioner's statements concerning the course of such newly-alleged proceedings are not properly before this Court.

relief demanded in the complaint, was filed over seven months after the final and binding grievance award was issued.[3]

Anchor has consistently maintained that the petitioner's claims are time barred.[4] In response to Del Costello's original complaint, allegedly grounded on 29 U.S.C. §§185, 301 and 411, Anchor specifically asserted that the prosecution of the plaintiff's litigation was barred by the application of the appropriate statute of limitations. After discovery was completed, the respondents filed separate motions for summary judgment.[5] In each motion, it was asserted that Del Costello's claims were barred by the statute of limitations. Specifically, Anchor and Local 557 maintained that the application of a thirty-day statute of limitations derived from Maryland's limitations period for the filing of actions to vacate arbitration awards, Md. Cts. & Jud. Proc. Code Ann. §3-224, applied in conjunction with Maryland Rule of Procedure E4, precluded the district court from considering the merits of the plaintiff's claims.

At first, in reliance on the recent decision of the Court of Appeals for the Second Circuit in *Mitchell v. United*

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3. Contrary to the petitioner's assertions, the district court did not "conclude" that Anchor and Local 557 were estopped from claiming that the statute of limitations began to run before December, 1977. The court stated that "[e]ven assuming that limitations did not begin to run until . . . late December, 1977" the action was not timely filed. The court declined to decide the issue of estoppel because it deemed the resolution of that issue unnecessary.

4. The issue of waiver of the statute of limitations defense was neither raised by the petitioner nor considered by the court at any point in the district court proceedings.

5. The International, which is not a party to this petition, submitted a separate motion for summary judgment urging the dismissal of all claims against it on different grounds. This motion was granted.

Parcel Service, Inc., 624 F.2d 394 (2d Cir. 1980), the Maryland district court declined to grant the respondents' motions for summary judgment.[6] However, following the reversal of the Second Circuit decision by this Court and upon review of the respondents' joint motion for reconsideration the district court recognized the propriety of applying the principles explained by the Supreme Court in *Mitchell* to the case at hand and granted judgment in favor of the respondents.[7] Petitioner filed a timely notice of appeal from this second Order to the Court of Appeals for the Fourth Circuit.[8] The court considered the briefs and oral arguments of petitioner and respondents. In an unpublished per curiam opinion, the appellate court affirmed the decision of the district court.[9] Petitioner now seeks this Court's review of his claims. However, the issuance of a writ of certiorari is not warranted.

REASONS WHY THE WRIT SHOULD BE DENIED

SUMMARY

Supreme Court review of this case is unwarranted. The petitioner has established no special or important reasons justifying the granting of a writ of certiorari. Instead of demonstrating that a conflict exists between the de-

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6. *Delcostello v. Intern. Broth. of Teamsters*, 510 F. Supp. 716 (D. Md. 1981).

7. *Delcostello v. International Broth. of Teamsters, etc.*, 524 F. Supp. 721 (D. Md. 1981).

8. No appeal was taken concerning the granting of summary judgment in favor of the International. In addition, the petitioner's appeal did not question the dismissal of his claims filed pursuant to 29 U.S.C. §§301 and 411.

9. 679 F.2d 879 (4th Cir. 4/19/82).

cisions of courts of appeals on issues decided by the Fourth Circuit in this case, the petitioner has shown no more than a lack of harmony among inapposite district courts' determinations. Instead of presenting this court with substantial authority to support his views, the petitioner has merely indicated his reliance on limited dissents and some scattered opinions of district courts. The Court cannot allow a writ of certiorari to issue in this context, where, in addition, not all of the petitioner's reasons for granting the writ were urged at the district court level.

ARGUMENT

I. Maryland's Limitations Period for Actions to Vacate Arbitration Awards Was Correctly Applied to Bar the Petitioner's §301 Action Against Local 557

There is no significant conflict between the circuit courts concerning the application of *Mitchell* to §301 actions against unions.[10] With but one exception,[11] the decisions of the appellate courts that have had an opportunity to consider the issue on a full record have been in accord with the opinion of the Fourth Circuit applying the state limitations period for actions to vacate arbitration

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10. The resolution of this particular issue in no way affects the applicability of Maryland's thirty-day limitations period for the vacation of arbitration awards to the petitioner's claims against respondent Anchor. Nonetheless, Anchor addresses this issue in order to underscore the respondents' position that certiorari is neither necessary nor warranted in this instance.

11. *Flowers v. Local 2602, United Steel Workers*, 671 F.2d 87 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3006 (U.S. July 13, 1982) (No. 81-2408) discussed *infra*.

awards.[12] In this context, Supreme Court review of the Fourth Circuit's decision is unnecessary and unwarranted.

A careful reading of *Mitchell* reveals that its holding was designed to apply to the union as well as the employer. The only defendant before the *Mitchell* Court was the employer. 451 U.S. at 71. However, it was apparent to Justice Stevens that the Court's ruling would be equally applicable to both employer and union. Accordingly, he filed a separate opinion, dissenting from application of the defense to unions. 451 U.S. at 72. To deny the efficacy of the limitations defense to unions would give full effect to Justice Stevens' dissent, rather than to the majority's opinion. *Mitchell v. United Parcel Service, Inc.*, Case 78-C-1547 (E.D. N.Y. October 13, 1981). Therefore, it was proper for the court of appeals to affirm the lower court's decision to apply Maryland's thirty-day limitations period to bar the petitioner's action against Local 557.

In *Badon v. General Motors Corp.*, 110 L.R.R.M. 2562, 5 Lab. L. Rep. (CCH) (94 Lab. Cas.) ¶13,572 (6th Cir. 1982), the Court of Appeals recognized that the state's limitations period for arbitration vacation actions would have to be applied to §301 claims against a union, if it was possible to do so under Michigan's law. However, Michigan had specifically excluded labor arbitration from coverage by its twenty-day limitations period and did not counterbalance this exclusion with a savings provision similar to Maryland's Rule E4, Md. R. P. which would allow the use of the local limitations period in the federal proceedings. The Court of Appeals, which did not deem itself com-

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12. Although district courts in various jurisdictions may have reached apparently inconsistent results, the resolution of such conflicts is best left for the courts of appeals in the first instance. It is, therefore, not appropriate for this Court to grant a writ of certiorari on the basis of the existence of non-uniform results at the district court level.

petent to override the will of the state and apply the limitations provision despite that exclusion, could find no other state limitations period that effectuated Congress' desire for the rapid resolution of labor disputes. Consequently, it applied the six month limitations period found at §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). A similar set of facts compelled the Court of Appeals for the Fifth Circuit to select Texas' two year statute of limitations for tort claims in a §301 action against a union. In *Edward v. Sea-Land Service, Inc.*, 678 F.2d 1276 (5th Cir. 1982), as in *Badon*, the court indicated that its first choice would be to apply the local limitations period for arbitration vacation actions if that option was not expressly eliminated by the state.

One relevant point emerges from these cases, notwithstanding any possible error in the decision of these two circuit courts to abide by the states' exclusion of labor matters from coverage of the local limitations provisions: The Fifth and Sixth Circuits have made it plain that, under facts similar to those present in Del Costello's case, they would join the Third[13] and Fourth[14] Circuits in applying the state limitations period for actions to vacate arbitrations to §301 claims asserted against a union.

Only one other appellate court has had the opportunity to address this issue directly on a full record. However, a number of other courts of appeals have discussed the question of what limitations period they would apply to §301 actions against unions. The First Circuit suggests that

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13. *Service Employees International Union, Local No. 36, AFL-CIO v. Office Center Services, Inc.*, 670 F.2d 404 (3rd Cir. 1982).

14. *Delcostello v. International Broth. of Teamsters, etc.*, 679 F.2d 879 (4th Cir. 1982).

a statute of limitations for tort actions would be applied, in conformity with controlling past precedent in the circuit.[15] The Seventh Circuit might apply the NLRA's six-month limitations period.[16] The Ninth Circuit would apply arbitration vacation limitations periods to post-*Mitchell* cases, and tort action statutes of limitations to cases filed before *Mitchell*.[17]

The unsolicited comments of these three courts did not result from the review of records wherein the application of an arbitration vacation statute of limitations was at issue. The parties in these cases were given no opportunity to address the issue of whether this limitations period should apply to §301 suits against unions or to present all of the relevant facts in support of their positions on this subject. As a result, the varied intimations of the First, Seventh and Ninth Circuits have no precedential value and can create no conflict for this Court to resolve.

Only the Court of Appeals for the Second Circuit, when directly confronted with the issue, declined to apply an available state limitations period for arbitration vacations to §301 actions against unions. In *Flowers v. Local 2602, United Steel Workers, supra* n. 11, the appellate

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15. *Sear v. Cadillac Auto Co. of Boston*, 654 F.2d 4 (1st Cir. 1981) (Summary judgment for union affirmed. Adoption of limitations period for vacating arbitration awards not urged at trial level or at appellate arguments.)

16. *Davidson v. Roadway Express, Inc.*, 650 F.2d 902 (7th Cir. 1981), *cert. denied*, ... U.S. ....., 102 S.Ct. 1447, 71 L.Ed.2d 661 (1982) (Action only against employer, not union.)

17. *Singer v. Flying Tiger Line Inc.*, 652 F.2d 1349 (9th Cir. 1981) (Adoption of state statute of limitations for vacating arbitration awards never raised in district court.); *Christian v. Pioneer Sand & Gravel Co.*, No. 81-3003 Slip op. (9th Cir. June 25, 1982). (Summary judgment granted in favor of the union on the basis of a three year statute of limitations in a pre-*Mitchell* decision not appealed.)

court neither adopted the ninety-day period suggested by *Mitchell* and accepted by *Mitchell v. United Parcel Service, Inc.*, Civil Action No. 78-C-1547 (E.D. N.Y. October 13, 1981), nor the six year statute of limtations that had been historically utilized by the Second Circuit, *e.g., Abrams v. Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1978). Instead, the court applied the reasoning of Justice Stevens' dissent in *Mitchell* and imposed a three year limitations period for malpractice actions to the claims against the union.

Because *Flowers* follows the dissent of one Justice rather than the will of the majority of the Court or even precedent within the Second Circuit, it is an aberration entitled to no weight. For this reason it also cannot be considered as establishing a conflict among the courts of appeals. However, if the incongruous result in *Flowers* were to be considered in serious conflict with the decisions of the Third, Fourth, Fifth and Sixth Circuits, this Court should resolve that conflict directly by granting the petition for a writ of certiorari now pending before this Court in *Flowers*[18] and not the petition in this case.

The allowance of a writ of certiorari in *Flowers* would make the Court's review of this case superfluous. At the same time, denying the petition for a writ of certiorari in this case would allow the Court to avoid the problems inherent in a collateral attack of the *Flowers* decision. Sound reason and judicial economy therefore dictate that whether or not *Flowers* is found to create a conflict among the circuits in the choice of limitations period to be applied in §301 actions against unions, the petitioner's request for a writ of certiorari in this case should be denied.

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18. *See supra* note 11, at 11.

II. There Was No Error in the Refusal to Apply the Six Month Limitations Period From the National Labor Relations Act to This §301 Proceeding

It is not appropriate for this Court to determine whether the six month limitations period described at §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), is applicable to actions filed pursuant to §301 of the Labor Management Relations Act for the reason that this issue was not properly raised at the district court level and preserved for reconsideration. Although the petitioner casually alluded to the existence of §10(b) as an alternative statute of limitations provision in his briefs in response to the respondents' motions for summary judgment, at no time did he urge the district court to adopt that six month limitations period. To the contrary, while strenuously advocating the implementation of a tort or contract statute of limitations before the district court, the petitioner expressly relied on judicial precedent that proclaimed the inapplicability of §10(b)'s limitations provision to §301 actions and stated that "it would be presumptious to expect this Court to promulgate a new national policy establishing six month limitations for all 301 actions . . ."

The petitioner's failure to urge implementation of §10(b) before the district court defeats any argument he may have been able to raise at that level. *American Casualty Co. v. Morris*, 51 F. Supp. 889 (N.D. W.Va. 1943), *aff'd*, 146 F.2d 208 (4th Cir. 1944). The desirability of finalizing judgments and terminating litigation leads to the binding of a party to the theories presented to the district court. *In re Linda Coal and Supply Company*, 255 F.2d 653 (3rd Cir. 1958); *Booth v. State Farm Mut. Automobile*

Ins. Co., 138 F.2d 844 (4th Cir. 1943). If the petitioner felt compelled to raise this issue, the district court was the appropriate initial forum. Having failed to urge the application of §10(b) at that initial stage in this proceeding, he is not able to do so now. Accordingly, the petitioner's request for review of this question must be denied.

The Court should not issue a writ of certiorari based on the petitioner's assertion that the §10(b) limitations provision should have been applied even if the matter is properly before this Court. The question properly before the Court in this instance is very narrow: In a §301 action that has been preceded by arbitration involving the same parties and issues, is it correct to apply a viable state limitations period for the vacation of arbitration awards to the petitioner's claims? *Mitchell* compels an affirmative response and practically all of the courts of appeals have demonstrated that they would tender the same answer. Consequently, there is no issue for this Court to resolve.

The holding in *Mitchell* is clear; in accordance with the principles laid down in *International Union, United Auto Wkrs. v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), and myriad other §301 actions, a state statute of limitations is to be applied to actions such as the present one.[19] Moreover, in the states which enjoy the presence of a law governing the vacation of arbitral awards with an accompany-

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19. Section 10(b) states that the six month limitation period contained therein only applies to the filing of a charge with the National Labor Relations Board, not to the filing of any implied statutory cause of action. "Congress could not have intended for the §10(b) statute of limitations to apply to suits as the present one." *Suwanchai v. I.B.E.W., Local 1973*, 528 F. Supp. 851 (D. N.H. 1981). *See also, Local 1020 v. FMC Corp.*, 658 F.2d 1285, 1289, n. 6 (9th Cir. 1981); *Davidson v. Roadway Express, Inc.*, 650 F.2d 902, 904, n. 2 (7th Cir. 1981).

ing statute of limitations,[20] *Mitchell* provides that this limitation is to be applied to the analogous action under §301, where the federal litigation has been preceded by arbitration or its equivalent.[21] Thus, the Supreme Court has left it to either the state legislatures to adopt a statute of limitations for actions to vacate arbitration awards where one is absent or the United States Congress to adopt a uniform applicable statute of limitations, if uniformity is deemed necessary.

The establishment of a nationally uniform statute of limitations for §301 actions by the adoption of §10(b)

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20. Petitioner argues, although he was silent in the district court, that the Maryland Arbitration Act is expressly inapplicable to labor disputes (Brief of Appellant at 30). The thirty day limitations period is found in Md. Cts. & Jud. Proc. Code Ann. §3-224. The exclusion from the Maryland Arbitration Act of labor matters is remedied by Maryland Rule of Procedure E4. That Rule applies the procedural framework of the Act to arbitration matters for which the Act is inapplicable. Therefore, the decision of the Fourth Circuit is consistent with the decisions of the Fifth Circuit in *Edward v. Sea-Land Service, Inc., supra,* and the Sixth Circuit in *Badon v. General Motors Corp., supra.* Moreover, the statute of limitations found in §3-224 is applicable to this action in accordance with *Mitchell,* notwithstanding the fact that the plaintiff here might not be able to maintain a direct action under §3-224. The employee need not be able to vacate the arbitration under the state's provision. Its limitations period will still be applied to the similar federal §301 action. The Supreme Court in *Mitchell* specifically provided that "[t]he fact that an employee could not bring a direct suit to vacate an arbitration award, however, does not mean that his section 301 claims, which if successful would have the same effect is not 'closely analogous' to such an action." 451 U.S. at 61, n. 3.

21. Petitioner has attempted to create the appearance of a conflict between the circuits by citing numerous decisions in support of the proposition that a statute of limitations other than the one for vacating arbitration awards is to be applied to §301 actions that were not preceded by arbitration. These cases are inapposite due to the fact that the petitioner's litigation was in fact preceded by arbitration. Moreover, in the one appellate court decision cited by the petitioner, *Baker v. Amsted Industries, Inc.*, 656 F.2d 1245 (7th Cir. 1981), the choice of statute of limitations was not an issue.

would be unnecessary and unwarranted judicial legislation. The non-uniformity of limitations periods was foreseen in *Mitchell*, 451 U.S. at 63, n. 5, 64. This lack of uniformity has been held to be inoffensive to the national labor policy. *See Service Employees International Union, Local No. 36 v. Office Center Services, Inc., supra*, at 2556.

Fair representation actions are not the only federal actions for which non-uniform state limitations are utilized. *See e.g., Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975) (Civil Rights Act of 1866); *Cope v. Anderson*, 331 U.S. 461, 463 (1947) (National Bank Act); *O'Sullivan v. Felix*, 233 U.S. 318, 322 (1914) (Civil Rights Act of 1871); *Chattanooga Foundry v. Atlanta*, 203 U.S. 390, 397 (1906) (Sherman Act); *Campbell v. City of Haverhill*, 155 U.S. 610 (1895) (Patent Act). In remaining silent on the limitations period of §301, it cannot be inferred that Congress "did so in the expectation that the courts would invent one." *Auto Workers v. Hoosier Cardinal Corp., supra*, 383 U.S. at 703. The petitioner, by requesting the application of §10(b)'s limitations period to this case, seeks the same relief that was denied in *Hoosier Cardinal Corp.* No developments in the ensuing years support reversal of that ruling.

There is no conflict between the circuits concerning the refusal to apply the §10(b) limitations provision to §301 actions such as the petitioner's. The courts of appeals that have had occasion to consider the applicability of §10(b) on a full record have consistently declined to adopt it if there was any local limitations provision that could be utilized consistent with those national labor pol-

icies promoting the rapid resolution of labor disputes.[22] Three Circuit Courts have specifically rejected application of §10(b) to §301 actions.[23] They rightly concluded that the NLRA's provision was designed to relate only to the initiation of administrative proceedings and not judicial proceedings under a separate federal statute. This uniform approach to the issue of whether §10(b) should be applied to a case akin to the petitioner's is consistent with this Court's holding in *Mitchell*. Consequently, there is no reason for this Court to allow the issuance of a writ of certiorari; there is no conflict or controversy of national significance for the Court to resolve.

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22. In *Sear v. Cadillac Auto Co. of Boston*, 654 F.2d 4 (1st Cir. 1981), the First Circuit did not rest its decision on the applicability of any statute of limitations. However, the court suggested that Massachusett's arbitration vacation limitations period appeared to be applicable to the claims against the company. The court did not consider adoption of §10(b). To the contrary, the Second Circuit specifically considered and rejected the utilization of §10(b) in a §301 action in *Flowers v. Local 2602, United Steel Workers, supra*. The Third Circuit similarly rejected the suggestion of the adoption of §10(b) in *Service Employees Intern. Union, Local No. 36 v. Office Center Services, Inc., supra*, as did the Fourth Circuit in the case at bar and the Fifth Circuit in *Edward v. Sea-Land Service, Inc.*, 678 F.2d 1276 (5th Cir. 1982). The Sixth Circuit implemented the NLRA's limitation period in *Badon, supra*, only after the court determined that Michigan had no applicable limitations provision consistent with Congress' intent that labor disputes be quickly resolved. This decision is in harmony with those of the Seventh Circuit in *Davidson v. Roadway Express, Inc., supra*, and the Ninth Circuit in *Singer* and *Christianson*, which suggest application of local arbitration limitations periods to §301 actions.

23. The Second Circuit in *Flowers*, the Third Circuit in *Service Employees* and the Fifth Circuit in *Edward* each expressly rejected utilization of §10(b) in actions under the Labor Management Relations Act.

III. Retrospective Application of United Parcel Service, Inc. v. Mitchell Is Appropriate

There is no conflict between the circuits concerning whether *Mitchell* is to be retroactively applied. When the issue of retrospective application of the principles enunciated in *Mitchell* have been raised in a timely fashion, the courts of appeal have unanimously supported retroactive application if such action is consonant with the directives of *Chevron Oil Co. v. Huson*, 404 U.S. 91 (1971). It follows then that this Court need not issue a writ of certiorari to determine whether retrospective application was appropriate in this instance.

The decision of the Fourth Circuit in this case is not in conflict with the Ninth Circuit's opinion in *Singer v. Flying Tiger Line Inc.*, 652 F.2d 1349 (9th Cir. 1981). The issue of retroactive application of *Mitchell* was not properly before the *Singer* court. In contrast to the present case, in *Singer* the applicability of California's limitations period for actions to vacate arbitration awards of §301 claims was never urged before the district court. As a result, neither that court nor the court of appeals was in a position to confront and resolve the issue on a full record. Consequently, the *Singer* court's discourse on retroactive application of *Mitchell* is non-controlling dicta and simply cannot be held to establish a significant conflict with the holdings of the other courts of appeals.

In this case the lower courts correctly concluded that it was proper to apply Maryland's limitations period for vacating arbitration awards to the petitioner's action. The decision to allow retrospective effect to *Mitchell* was in accordance with the guidelines of *Chevron, supra*. In *Chevron* the Court composed a three-part test to be utilized in deciding whether retroactive application of a ju-

dicial decision is warranted. The petitioner failed to establish that consideration of all these factors in the context of the facts of this case favored prospective-only application.

The *Mitchell* case followed the decisions of several courts that applied state statutes of limitations for actions to vacate arbitration awards to cases brought pursuant to §301, when the substance of those proceedings involved disputes between the same parties, heard and resolved by an arbitration panel. It was neither the intent nor effect of the Supreme Court to overrule or radically change the status of the law with *Mitchell*. As early as 1967 federal courts had been applying similar limitations periods in order to conform with the intertwined national labor policies of encouraging the rapid resolution of labor disputes and ensuring the finality of grievance arbitration awards. At the time when the petitioner's claims could have been timely filed, no federal court decision existed to support Del Costello's contention that he relied on some now-invalid legal principle when he deferred the commencement of his action.

The petitioner had no legal basis to arrive at a determination in 1977 that he could forbear from instituting suit for eight months. However, even if the law had been different, the petitioner was required to demonstrate that he actually relied upon it, rather than merely alleging that such reliance could have transpired. Actual detrimental reliance was absent in the instant case. At no point in the proceedings before the district court did the petitioner indicate that detrimental reliance upon any case holding was undertaken. Therefore, the balance of the equities was rightly struck in favor of retrospective application of *Mitchell*.

The rule to be applied from *Mitchell* and the policy it promotes are one, compelling retrospective application in this case. *E.g., Cash v. Califano*, 621 F.2d 626 (4th Cir. 1980). The Congressionally described need for predictability in labor relations mandates the rejection of claims raised by those who, like the petitioner, might appear even years from now to complain about arbitrations that occurred before *Mitchell* was announced. Deferral to the generally shorter limitations period helps to keep the "law of the shop" workable. Retroactive application of *Mitchell* in this case enhances the policy considerations enunciated by the Court. Accordingly, the lower courts' denial of the petitioner's request for an exemption from retroactive application was appropriate.

The fact that the retroactive application of the rule of law set forth in the *Mitchell* case will deprive the petitioner in this particular action of his opportunity to challenge the grievance committee's award does not create a bar to retroactive application. Faced with this situation, the courts have often denied a litigant's request for non-retrospective application of new case law.

Since the development of a distinct rule on limitations for litigants dissatisfied with an arbitration rule was foreseeable and consonant with the scattered decisions which had addressed the question, the court of appeals and district court correctly concluded that the equities favor retroactive operation of the Court's *Mitchell* decision.

The record below establishes that the District Court for Maryland and the Court of Appeals for the Fourth Circuit gave substantial consideration to this Court's *Chevron* criteria before agreeing to give *Mitchell* retrospective effect. Their well-supported determinations are in harmony with those of other courts of appeals. Therefore,

there is no conflict between the circuits for this Court to resolve, no new important question of federal law for this Court to settle, and no special or important reason for this Court to grant the petitioner's request for a writ of certiorari.

CONCLUSION

The court of appeals' determination is wholly consistent with the decisions of this Court and other federal appellate courts. Therefore, it is respectfully submitted that the petition for a writ of certiorari must be denied or the lower court's decision must be affirmed.

Respectfully submitted,

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